

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRED WASSON)	
Claimant)	
VS.)	
)	Docket No. 198,285
UNITED DOMINION INDUSTRIES)	
Respondent)	
AND)	
)	
UNITED STATES FIDELITY & GUARANTY CO.)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund requested review of the Award dated June 18, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on November 26, 1997.

APPEARANCES

M. Doug Bell of Coffeyville, Kansas, appeared for the respondent and its insurance carrier. David J. Bideau of Chanute, Kansas, appeared for the Workers Compensation Fund. Claimant did not appear.

RECORD AND STIPULATIONS

The record considered by the Appeals Board is listed in the Award. No stipulations were taken.

ISSUES

The Administrative Law Judge found that claimant failed to prove he sustained an injury while working for the respondent and ordered the Workers Compensation Fund to reimburse the respondent and its insurance carrier the sum of \$43,925.37. The only issue before the Appeals Board on this review is the liability of the Workers Compensation Fund under K.S.A. 1992 Supp. 44-534a(b).

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant alleged he injured his back while working for the respondent on March 9, 1993. The respondent and its insurance carrier paid claimant \$20,332 in temporary total disability benefits, paid \$19,484.80 for claimant's medical expenses, and paid \$3,731.12 in medical management expense.
- (2) The insurance carrier took claimant's statement in April 1993. In that statement claimant failed to disclose he had filed previous workers compensation claims. When the insurance carrier discovered claimant had filed earlier claims in Oklahoma, the insurance carrier terminated his benefits. The last temporary total disability check sent to claimant represented payment for the week ending November 20, 1994.
- (3) Counsel for both the insurance carrier and Workers Compensation Fund represent that claimant's whereabouts are unknown and that claimant did not appear at either the mandatory pretrial settlement conference or the scheduled regular hearing. When claimant did not appear for regular hearing, a hearing was not held which explains the absence of a regular hearing transcript in the evidentiary record. Counsel for the insurance carrier represents that claimant has not contacted the insurance carrier after his benefits were terminated. The Appeals Board finds claimant has abandoned his claim.
- (4) The respondent and its insurance carrier submitted the only evidence introduced in the proceeding, the depositions of Michael H. Munhall, M.D., and the insurance carrier's Mary L. Fry. Based upon that evidentiary record, the Administrative Law Judge found that claimant had produced no evidence regarding the alleged accidental injury and had failed to satisfy his burden of proof to establish his entitlement to any workers compensation benefits. Therefore, the Administrative Law Judge ordered the Workers Compensation Fund to reimburse the respondent and its insurance carrier all the monies they had expended in this claim.

CONCLUSIONS OF LAW

The right of the respondent and its insurance carrier to seek reimbursement from the Workers Compensation Fund is governed by K.S.A. 1992 Supp. 44-534a(b) which provides:

If compensation in the form of medical benefits, temporary total disability benefits or vocational rehabilitation benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to a preliminary award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.

As the statute indicates, the director determines the amount to be reimbursed and then sends certification of that amount to the commissioner of insurance. In this instance, the Administrative Law Judge has acted for the director and has determined the amount of reimbursement. Therefore, the director should now transmit certification to the insurance commissioner.

The question before the Appeals Board is whether the Workers Compensation Fund has standing either to litigate the issue of its liability under K.S.A. 1992 Supp. 44-534a(b) or to appeal the Administrative Law Judge's determination of liability. Unlike K.S.A. 1992 Supp. 44-567 which specifically provides that the Workers Compensation Fund is to participate in all proceedings to determine the compensation to be awarded a handicapped employee, K.S.A. 1992 Supp. 44-534a(b) is silent regarding the Fund's right to litigate its liability for overpayments. Also, unlike K.S.A. 1992 Supp. 44-532a which imposes liability upon the Workers Compensation Fund where an insolvent employer has no insurance, K.S.A. 1992 Supp. 44-534a(b) does not have a related Kansas Administrative Regulation which provides that the Workers Compensation Fund is entitled to a hearing on the question of its liability for overpayment. See K.A.R. 51-15-2 which provides in part as follows:

The workers' compensation fund shall be entitled to a hearing on the question of its liability imposed by the provisions of K.S.A. 44-532a.

The Appeals Board finds that neither the Workers Compensation Act nor the Kansas Administrative Regulations give the Workers Compensation Fund the right to contest its liability under K.S.A. 1992 Supp. 44-534a(b). Therefore, the Workers Compensation Fund does not have standing to request review of the Administrative Law Judge's determination of overpayment and this appeal should be dismissed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this review should be, and hereby is, dismissed.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully dissent with the majority's decision. K.S.A. 1992 Supp. 44-566a provides that the Workers Compensation Fund is liable for (1) payment of awards to handicapped employees as provided by K.S.A. 44-569, (2) payment of awards when an insolvent employer has no insurance as provided by K.S.A. 44-532a, and (3) reimbursement for overpayments as provided by K.S.A. 44-534a. More importantly, K.S.A. 44-566a(c)(1) provides as follows:

Whenever the workers compensation fund may be made liable for the payment **of any amounts** in proceedings under the workers compensation act, the commissioner of insurance, in the capacity of administrator of such fund, **shall be impleaded** in such proceedings and **shall represent and defend** the workers compensation fund. The commissioner of insurance

shall be deemed impleaded in any such proceedings whenever written notice of the proceedings setting forth **the nature of the liability** asserted against the workers compensation fund, is given to the commissioner of insurance. (Emphasis added.)

I believe the above-quoted statutory language grants the Workers Compensation Fund the standing and right to litigate its liability under K.S.A. 1992 Supp. 44-534a(b).

I also believe the Administrative Law Judge erred in deciding the issue of overpayment based on whether claimant had satisfied his burden of proof. As indicated above, claimant did not participate in presenting evidence for purposes of obtaining a final award. Because the only issue before the Administrative Law Judge was whether respondent and its insurance carrier were entitled to reimbursement from the Workers Compensation Fund due to overpayment of benefits, under these circumstances I believe the respondent and insurance carrier, not the claimant, had the burden of proof. To satisfy that burden, I believe the respondent and its insurance carrier must prove both the existence and amount of any overpayment.

I would remand the proceeding to the Administrative Law Judge with directions to take stipulations and reopen the record to permit the parties to introduce any additional evidence which may now be desired in light of the specific issues to be addressed and in light of the above determination regarding the burden of proof.

BOARD MEMBER

DISSENT

The claimant did not prosecute his claim to an award “upon a full hearing on the claim” as contemplated by K.S.A. 1992 Supp. 44-534a(b). The respondent is prosecuting the claim and is, de facto, the claimant. The Fund should have a right to appear and defend the claim. Therefore, I concur with the above Dissent to the extent it would hold under the facts of this case that the Fund has standing to bring this appeal.

BOARD MEMBER

c: M. Doug Bell, Coffeyville, KS
David J. Bideau, Chanute, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director